



April 1, 1999

Ms. Regina Atwell  
City Attorney  
City of Cleburne  
P.O. Box 677  
Cleburne, Texas 76033-0677

OR99-0891

Dear Ms. Atwell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 123127.

The City of Cleburne (the "city") received two requests for statements that the requestors made to the police department pertaining to a particular incident that occurred in May 1998. You ask whether the requested information is confidential pursuant to section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. We have considered your arguments and reviewed the submitted representative sample of information.

First, you state that one of the requestors did not submit a written statement; therefore, no such record exists. The Open Records Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). Thus, you need not comply with such request.

Second, you state that although you are not required to ask this office for a ruling, it is your policy to do so when you believe that information is excepted from public disclosure under section 552.108(a)(2) or (b)(2) because the investigation did not result in a conviction or deferred adjudication. In fact, the city is required to ask this office for a ruling when it wishes to withhold information pursuant to an exception under the Open Records Act. Gov't Code § 552.301; *see* Gov't Code §§ 552.321, .353.

Lastly, we address your concerns under section 143.089 of the Local Government Code. We understand that the city is a civil service city under chapter 143. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). The civil service file must contain certain specified items, including documents relating to any misconduct in those cases where the police department took disciplinary action against the peace officer. *Id.* § 143.089(a)(2).

However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *Id.* § 143.089(b), (c). Thus, subsections (a)-(c) limit the contents of the civil service file.

Subsection (g) authorizes but does not require the city police department to maintain for its use a separate and independent, internal personnel file on a peace officer. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records may not be withheld under section 552.101 of the act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

You inform us that the requested statement is part of an internal affairs investigative file concerning a complaint of false arrest by a certain police officer. You further explain that the investigation has concluded, the accusation was not sustained, and no disciplinary action was taken against the police officer. Thus, the statement was not placed in the civil service file. However, you inform us that the statement has not been placed in a section 143.089(g) department file although the police "[c]hief has the right to do [so] if he so wishes." Thus, from your representation, the statement is in neither the civil service file nor the police department's internal (g) file, but some other file maintained by the police department. We find that such a practice contravenes the purpose and legislative intent of section 143.089.

In *City of San Antonio*, the court determined that the provisions of section 143.089 governing the contents of the civil service file evidence "a legislative policy decision against disclosure

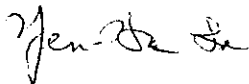
of unsubstantiated claims of misconduct made against police officers and fire fighters, except with an individual's written consent." 851 S.W.2d at 949. With regard to documents relating to allegations of misconduct, section 143.089 contemplates only two files. Documents relating to allegations resulting in disciplinary action must be placed in the civil service file and is subject to public disclosure under the act. Local Gov't Code § 143.089(a)(2). However, if the documents relate to unsustained allegations of misconduct or disciplinary action taken without just cause, the police department is prohibited from placing such documents in the civil service file. *Id.* § 143.089(b), (c). Documents in the latter category must, therefore, be in the department's confidential (g) file. To hold that the department may maintain such documents elsewhere and be subject to public disclosure would render meaningless the city's election to be governed by the civil service statute which proscribes the inclusion of such documents in the civil service file. To do so would also thwart the legislative purpose as noted by the *City of San Antonio* court:

All parts of section 143.089 are quite obviously designed to work in harmony with each other and in harmony with the disclosure provisions of the [Open Records] Act under the general legislative policy that allegations of misconduct made against a police officer shall not be subject to compelled disclosure under the Act unless they have been substantiated and resulted in disciplinary action.

851 S.W.2d at 949. Accordingly, because the statement at issue is a document that relates to an unsustained allegation of misconduct, it cannot be placed in the civil service file. The police department's maintenance of the statement must be as part of the (g) file. Consequently, the statement is confidential under section 143.089(g) of the Local Government Code in conjunction with section 552.101 of the Government Code, and the city must withhold the statement.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref.: ID# 123127

Enclosures: Submitted document

cc: Ms. Ashlee Poe  
206 S. Douglas  
Cleburne, Texas 76031  
(w/o enclosures)

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